

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

SMEDLEY PRESCOD,

Defendant.

**REPORT
and
RECOMMENDATION**

05-CR-92A(F)

APPEARANCES: KATHLEEN M. MEHLTRETTER
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Attorney for the Government
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Defendant is charged with alien smuggling pursuant to 8 U.S.C. § 1324(a)(1)(A)(iv).

Defendant has moved, *inter alia*, to suppress pretrial identification by witnesses expected to testify at trial. However, Defendant's moving papers fail to provide any colorable basis to believe such identification, in this case a photo array, was unduly suggestive. Accordingly, no evidentiary hearing is required, and the motion should be DENIED. *United States v. Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969) (court not required to conduct evidentiary hearing to determine admissibility of identification evidence unless defendant sets forth facts which, if proven, would entitle him to the

relief sought), *cert. denied*, 369 U.S. 1019 (1970). See *Dunnigan v. Keane*, 137 F.3d 117, 129-29 (2d Cir.) (observing in the context of habeas corpus that U.S. Supreme Court has held that although a pre-trial identification hearing is advisable when defendant contends pre-trial identification was result of impermissibly suggestive procedures, such hearing was not required), *cert. denied*, 525 U.S. 820 (1998).

Respectfully Submitted

/s/ *Leslie G. Foschio*

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: July 28, 2005
Buffalo, New York

Pursuant to 28 U.S.C. §636(b)(1), it is hereby
ORDERED that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil Procedure and Local Rule 72.3.

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order.

Thomas v. Arn, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Government and the Defendant.

SO ORDERED.

/s/ *Leslie G. Foschio*

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: July 28, 2005
Buffalo, New York